Lee Lay Ling v Goh Kim Nam (Cheah Pei Ching, co-respondent)

HIGH COURT (PULAU PINANG) — DIVORCE PETITION NO 33–219 OF 2010
S NANTHA BALAN JC
18 OCTOBER 2013

Civil Procedure — Proceedings — Committal proceedings — Divorce — Order containing monetary and non-monetary terms — Order for disposal of matrimonial home — Division of proceeds — Failure to make various payments in court's order — Whether act of contempt — Whether entitled other party to commence committal proceedings against defaulting party — Rules of Court 2012 O 45 r 1(a)(i)

The petitioner/wife ('PW') and the respondent/husband ('RH') were divorced pursuant to an order ('the order') which contained monetary terms to be fulfilled by RH and non-monetary terms pertaining guardianship, custody, care, control and access in respect of the two children of the marriage. There was also an order for the disposal of the matrimonial home and for the proceeds to be divided. This was an application for committal by the PW against the RH which was predicated on the latter's failure to make various payments as ordered by the court in the course of matrimonial proceedings. The issues that arose were whether a failure or refusal by a party to comply with an order of court to make payments, whether by way of lump sum or installment payments, would constitute an act of contempt so as to entitle the other party to commence committal proceedings against the defaulting party; and whether, apart from execution proceedings, the party in breach might also be subjected to committal proceedings by reason of breach of his obligation to make payments as per the court order.

Held:

(1) The issue had wide implications not only in matrimonial proceedings but to all legal proceedings which culminated in monetary orders. Hence, if non-payment constituted an act of contempt, then the consequences would be grave for all those who were in breach of any payment as ordered by the court as they would find themselves facing committal proceedings and suffer the pain of a fine or imprisonment or both (see para 1).

(2) The order had 13 terms, of which payment obligations were only a part of the order. There were several non-monetary aspects of the order, the

disobedience of which would amount to contempt of court. There was no merit in this point. The mere presence of the penal endorsement was not sufficient to overcome the prohibition to contempt and committal. Thus, the mere presence of the penal endorsement did not of itself mean that all the terms of the order were such that they fell within O 45 r 1(a)(i) of the Rules of Court 2012 ('ROC') so as to enable an applicant to commence committal proceedings for disobedience of the order. The terms as contained in the order had to be examined for substance and must ultimately be one which was recognised by law as constituting an act, the disobedience of which would attract the penalties or punishment which would flow from its breach or disobedience (see para 17).

(3) If monetary judgments, whether they were to be paid in a lump sum or at different intervals by way of instalments payment, were to be enforced by way of committal proceedings then the effect would be that all judgments for the payment of money might, without any exception, be enforced by committal proceedings. That would mean that every judgment debtor who failed to make payment under an order of court would be liable to committal proceedings quite apart from the prospect of being adjudicated a bankrupt or having to face execution proceedings by way of a writ of seizure and sale, garnishee or charging order. If that was the intent of the ROC then it must be clearly and unequivocally stipulated as such. Order 45 r 1 of the ROC had stipulated very clearly how monetary judgments were to be enforced. It was equally clear that committal was not a mode of enforcement for a monetary judgment, unless it was a monetary judgment which fell within O 45 r 5 of the ROC (see para 20).

(4) It would be wrong as a matter of principle to draw adverse or negative inferences against the RH especially in committal proceedings which were quasi criminal in nature where the charge of contempt had to be proven beyond reasonable doubt. It would become all the more necessary and imperative that the matter be determined on the basis of the undisputed facts or facts which have not been credibly denied. Critically, there was no attempt to cross examine RH on his averments in his affidavits with regards to his impecuniosity and bankruptcy. Accordingly, the invitation by the PW to make adverse findings based on inferences of willful intent on the part of the RH to disobey, the order was declined (see paras 45–46).

[Bahasa Malaysia summary

Pempetisyen/isteri ('PW') dan responden/suami ('RH') telah bercerai menurut perintah ('perintah tersebut') yang mengandungi terma-terma kewangan yang perlu dipatuhi oleh RH dan terma-terma berkaitan hak penjagaan, jagaan, kawalan dan akses berhubung dua anak-anak daripada perkahwinan itu. Terdapat juga perintah untuk jualan rumah perkahwinan dan agar hasilnya dibahagikan. Ini adalah permohonan untuk komital oleh PW terhadap RH

yang berdasarkan atas kegagalan RH untuk membuat pelbagai bayaran sebagaimana diperintah oleh mahkamah sepanjang prosiding perkahwinan. Isu-isu yang timbul adalah sama ada kegagalan atau keengganan oleh satu pihak untuk mematuhi perintah mahkamah untuk membuat bayaran, sama ada melalui bayaran sekali gus atau ansuran, akan menjadi perbuatan penghinaan bagi memberi hak kepada pihak lain untuk memulakan prosiding komital terhadap pihak yang gagal; dan sama ada, selain daripada pelaksanaan prosiding, pihak yang melanggari itu juga mungkin tertakluk kepada prosiding komital disebabkan pelanggaran tanggungjawabnya untuk membuat bayaran tersebut sebagaimana perintah mahkamah.

Diputuskan:

(1) Isu tersebut mempunyai implikasi luas bukan hanya dalam prosiding perkahwinan tetapi kepada semua prosiding undang-undang yang berakhir dengan perintah-perintah kewangan. Justeru, jika kegagalan membayar merupakan perbuatan menghina maka akibatnya adalah serius untuk semua yang telah gagal membuat apa-apa bayaran sebagaimana diperintah oleh mahkamah kerana mereka akan mendapati diri mereka berhadapan dengan prosiding komital dan dikenakan denda atau penjara atau kedua-duanya (lihat perenggan 1).

(2) Perintah itu mempunyai 13 terma, yang mana kewajipan pembayaran hanya sebahagian daripada perintah itu. Terdapat beberapa aspek bukan mengenai kewangan dalam perintah itu, keingkarannya yang akan merupakan menghina mahkamah. Tiada merit dalam perkara ini. Kewujudan semata-mata satu pengendorsan hukuman penal tidak mencukupi untuk mengatasi larangan bagi penghinaan dan komital. Oleh itu, kewujudan semata-mata satu pengendorsan hukuman penal dengan sendirinya tidak bermaksud bahawa semua terma perintah itu terangkum di bawah A 45 k 1(a)(i) Kaedah-Kaedah Mahkamah 2012 ('KM') agar membolehkan pemohon memulakan prosiding komital kerana keingkaran perintah itu. Terma-terma sebagaimana terkandung dalam perintah itu perlu diteliti kepentingannya dan akhirnya perlu menjadi suatu yang diiktiraf oleh undang-undang sebagai membentuk sesuatu perbuatan, keingkarannya yang akan mewujudkan penalti atau hukuman yang timbul daripada pelanggaran atau keingkaran (lihat perenggan 17).

(3) Jika penghakiman mengenai kewangan, sama ada ia dibayar sekali gus atau di peringkat berbeza melalui bayaran ansuran, akan dikuat kuasakan melalui prosiding komital maka kesannya adalah semua penghakiman untuk bayaran wang itu mungkin, tanpa apa-apa pengecualian, dikuatkuasakan oleh prosiding komital. Ini bermaksud bahawa setiap penghutang penghakiman yang gagal membuat bayaran di bawah perintah mahkamah akan dikenakan prosiding komital yang jelas

berbeza daripada prospek untuk dihukum bankrap atau perlu menghadapi pelaksanaan prosiding melalui writ penyitaan dan penjualan, garnisi atau perintah pertuduhan. Jika itu niat KM maka adalah jelas dan tanpa ragu-ragu ditetapkan sedemikian. Aturan 45 k 1 KM telah menetapkan dengan jelas bagaimana penghakiman mengenai kewangan patut dikuat kuasakan. Ia juga jelas bahawa komital bukan cara penguat kuasaan untuk penghakiman mengenai kewangan, kecuali ia penghakiman mengenai kewangan yang terangkum di bawah A 45 k 5 KM (lihat perenggan 20).

(4) Adalah salah dari segi prinsip untuk membuat inferens yang bertentangan atau negatif terhadap RH terutamanya dalam prosiding komital yang bersifat separa jenayah di mana pertuduhan penghinaan hendaklah dibuktikan melampaui keraguan munasabah. Ia akan menjadi lebih perlu dan penting bagi perkara itu ditentukan berdasarkan fakta-fakta yang tidak dipertikaikan atau fakta yang tidak pernah dinafikan. Penting sekali, tidak ada sebarang usaha untuk memeriksa balas RH berhubung penegasannya dalam afidavitnya mengenai keadaannya yang ketiadaan wang dan bankrap. Oleh itu, tawaran daripada PW untuk membuat penemuan bertentangan adalah berdasarkan inferens berhubung niat yang disengajakan di pihak RH kerana tidak mematuhi, perintah itu telah ditolak (lihat perenggan 45–46).]

Notes

For cases on committal proceedings, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2036–2070.

Cases referred to

Dalip Bhagwan Singh v PP [1998] 1 MLJ 1, FC (folld)

Hong Kwi Seong v Ganad Media Sdn Bhd [2013] 2 MLJ 251, CA (not folld)

Hong Kwi Seong v Ganad Media Sdn Bhd and another appeal [2013] 6 MLJ 765, FC (refd)

Hong Leong Bank Bhd v Phung Tze Thiam John Phung [2008] 2 MLJ 785; [2008] 4 CLJ 742, CA (folld)

Interfood Sdn Bhd v Arthur Andersen & Co & Anor [2000] 5 MLJ 26, HC (refd)

Messrs Hisham, Sobri & Kadir v Kedah Utara Development Sdn Bhd & Anor [1988] 2 MLJ 239 (refd)

Smith & Fawcett Ltd, Re [1942] 1 All ER 542, CA (refd)

Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors [2012] 3 MLJ 458, FC (refd)

Tay Seng Keng v Tay Ek Seng Co Sdn Bhd [1978] 1 MLJ 126, FC (refd)

Legislation referred to

Debtor's Act 1957
Law Reform (Marriage and Divorce) Act 1976 s 86
Rules of Court 2012 O 45, O 45 r 1, O 45 r 1(a)(i), O 45 r 1(3), O 45 r 5, O 52, O 52 r 3(3)
Rules of the High Court 1980 O 52 r 2(2)

Sunny Khoo (John Khoo with him) (Sunny Khoo & Co) for the petitioner.
Daphney Choy (Tan Lok Heah & Normila bt Mohmad with him) (Tan Lok Heah & Assoc) for the respondent.

S Nantha Balan JC:

INTRODUCTION

[1] This is an application for committal by the petitioner/wife against the respondent/husband which is predicated on the latter's failure to make various payments as ordered by the court in the course of matrimonial proceedings. The sole issue that arises in this matter is whether a failure or refusal by a party to comply with an order of court to make payments (whether by way of lump sum or instalment payments) constitutes an act of contempt so as to entitle the other party to commence committal proceedings against the defaulting party. Ordinarily, the remedy would be for the party who is entitled to these payments to commence execution proceedings for recovery of the amounts that are payable under the order of court. The question that arose in these proceedings is whether, apart from execution proceedings, the party in breach may also be subjected to committal proceedings by reason of breach of his obligation to make payments as per the court order. It is obvious enough that the issue has wide implications not only in matrimonial proceedings but to all legal proceedings which culminate in monetary orders. Hence, if non-payment constitutes an act of contempt, then the consequences will be grave for all those who are in breach of any (lump sum or instalment) payment as ordered by the court as they will find themselves facing committal proceedings and suffer the pain of a fine or imprisonment or both.

THE BACKGROUND

[2] The background to this matter is that the petitioner/wife ('PW') and the respondent/husband ('RH') were divorced pursuant to an order that was made on 23 December 2011 ('the order'). The order was made after a full trial. The order contains monetary terms which had to be fulfilled by RH and non-monetary terms pertaining to guardianship, custody, care, control and access in respect of the two children of the marriage. There was also an order for the disposal of the matrimonial home and for the proceeds to be divided. There was also a monetary order that was made against the co-respondent or the

interloper of the marriage but that aspect of the order is not relevant for the purposes of the instant application that was made by PW against RH. For completeness, the terms of the order are set out below as follows:

(a) perkahwinan antara pempetisyen dan responden dibubarkan;

(b) pempetisyen diberikan hak jagaan dan 'sole guardianship' ke atas kedua-dua orang nak lelaki bernama Goh Yue Shen (No Daftar Sijil Kelahiran BJ 02067) dan Goh Yue Zhen (No Daftar Sijil Kelahiran BN 45109) dan responden diberikan hak lawatan di hujung minggu pada setiap dua minggu;

(c) responden membayar kepada pempetisyen wang sebanyak RM4,000 setiap bulan sebagai nafkah untuk kedua-dua orang anak lelaki (RM2,000 untuk setiap anak) pada atau sebelum 7 haribulan setiap bulan;

(d) responden membayar kepada pempetisyen wang sebanyak RM6,000 setiap bulan sebagai nafkah untuk pempetisyen pada atau sebelum 7 haribulan setiap bulan;

(e) responden membayar kepada pempetisyen wang sebanyak RM10,000 pada setiap awal tahun sebelum 7 haribulan bagi perbelanjaan percutian kedua-dua anak lelaki dan pempetisyen dan bagi perbelanjaan berkaitan Tahun Baru Cina serta persediaan sekolah kedua-dua orang anak lelaki;

(f) responden membayar fee persekolahan, fee tuisyen dan perbelanjaan lain bagi pelajaran dan pendidikan kedua-dua orang anak lelaki sehingga tamat ijazah pertama berdasarkan bil-bil atau dokumen yang dikemukakan bagi tujuan tersebut;

(g) responden meneruskan bayaran premium insuran bagi kedua-dua orang anak lelaki yang sedia ada;

(h) pempetisyen diberikan setengah bahagian ke atas rumah alamat No 16, Lengkok Betek, Taman Sri Jaya, 14000 Bukit Mertajam, Pulau Pinang dan nilaian setengah bahagian dibayar kepada pempetisyen dalam tempoh enam bulan dari tarikh perintah ini dengan cara penjualan hartanah No 16, Lengkok Betek, Taman Sri Jaya, 14000 Bukit Mertajam, Pulau Pinang pada nilai harga pasaran setelah menolak kos jualan atau alternatifnya responden membayar tunai kepada pempetisyen bagi nilai setengah bahagian hartanah tersebut dalam tempoh enam bulan dari tarikh perintah ini mengikut nilai pasaran semasa;

(i) pempetisyen diberikan seperempat bahagian keatas rumah alamat No 11 A, Lengkok Betek, Taman Sri Jaya, 140000 Bukit Mertajam, Pulau Pinang dan nilaian setengah dibayar kepada pempetisyen dalam tempoh enam bulan dari tarikh perintah ini dengan cara penjualan hartanah No

11A, Lengkok Betek, Taman Sri Jaya, 14000 Bukit Mertajam, Pulau Pinang pada nilai harga pasaran setelah menolak kos jualan atau alternatifnya responden membayar tunai kepada pempetisyen bagi nilai seperempat bahagian hartanah tersebut dalam tempoh enam bulan dari tarikh perintah ini mengikut nilai pasaran semasa;

(j) responden membayar *lump sum* sebanyak RM3,000 kepada pempetisyen dan bayaran harus dibuat dalam tempoh satu tahun dari tarikh perintah ini;

(k) co-responden membayar ganti rugi sebanyak RM100,000 kepada pempetisyen dan bayaran harus dibuat dalam tempoh 6 bulan dari tarikh perintah ini;

(l) Kos tindakan ini dibayar oleh responden; dan

(m) pihak-pihak diberi kebebasan untuk memohon bagi perintah lanjut untuk memberi kesan ke atas perintah-perintah yang dinyatakan di atas.

[3] The matter that came up before me was an application by the PW by way of notice of application dated 18 March 2013 (encl 46) for committal proceedings against the RH arising out of and in connection with his disobedience of the monetary terms of the order. Apparently, this is the second committal proceedings against RH. The first committal proceedings were also taken as a result of failure to comply with the payment obligations under the order. At the conclusion of the first committal proceedings, RH was fined. He paid the fine and settled the arrears of instalment that were due and owing to PW.

[4] As I said, PW filed a notice of application (encl 46) for an order for committal against the respondent for yet another failure to comply with the order. There was a penal endorsement at the end of the order which read as follows: *Jika kamu, Goh Kim Nam dan Cheah Pei Ching gagal mematuhi Perintah Mahkamah ini maka tindakan kamu adalah dianggap menghina mahkamah dan prosiding pengkomitan akan diambil terhadap kamu untuk memaksa kamu mematuhi Perintah ini.*

[5] In the statement pursuant to O 52 r 3(3) of the Rules of Court 2012 dated 6 February 2013 (encl 40) PW has set out the grounds on which the RH's committal is sought. PWs grounds can be summarised as follows:

(a) RH has breached the order dated 23 December 2011 which ordered him to pay a sum of RM2,000 a month for each of the two children of the marriage and RM6,000 a month for PW (para 2 of the said statement) since January 2012;

(b) RH has breached the order dated 23 December 2011 which ordered him

to pay a sum of RM10,000 every year before the 7th day of each year as holiday expenses for the children and PW, Chinese New Year expenses and preparations for school year (para 2 of the said statement) since January 2012;

(c) RH has failed to settle the outstanding maintenance sum of RM93,000 due from January 2012 to January 2013 (paras 2 and 4 of the said statement).

[6] It is not in dispute that RH had failed to comply with the financial obligations as stipulated under the order. RH's response to the committal proceedings is two—fold. First, it was argued on his behalf that in law, there can be no contempt for failure to comply with payment obligations under a monetary judgment. Second, it was contended for RH that in any event, by reason of his status as a bankrupt and his meager financial means, he is unable to fulfill his financial obligations under the order. RH therefore asks that the committal be dismissed.

THE LAW OF CONTEMPT

[7] Before embarking on an analysis of the facts and the issues relevant to the application for committal, it is appropriate to remind ourselves of the principles pertaining to the law of contempt, which underpin an application of this nature. In this regard I refer to the most recent statement of the substantive and adjectival aspects on the topic which is found in the judgment of the Chief Justice of the Federal Court, YAA Tun Ariffin bin Zakaria in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors* [2012] 3 MLJ 458. I will quote only those parts of the judgment that are relevant to the matter under discussion in this judgment.

> … [26] Contempt has been reclassified either as (1) *a specific conduct of contempt for breach of a particular court order;* or (2) a more general conduct for interfering with the due administration or the course of justice. This classification is better explained in the words of Sir Donaldson MR in *Attorney-General v Newspaper Publishing Plc* at p 362:
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> … [29] It is settled law that committal proceeding is criminal in nature since it involves the liberty of the alleged contemnor. Premised upon that, the *law has provided procedural safeguards in committal proceeding which requires strict compliance.* In this regard, Cross J in *Re B (JA) (An Infant)* [1965] 1 Ch 1112 had this to say:
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> *Committal is a very serious matter.* The courts must proceed very carefully before they make an order to commit to prison; and *rules have been laid down to secure that the alleged contemnor knows clearly what is being alleged against him and has every opportunity to meet the allegations.*
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> …

A [32] In *Chanel Ltd v FGM Cosmetics* [1981] FSR 471 Whitford J was reported to refuse an order of committal as he found the *notice of motion for committal before him to be bad because it failed on its face to specify the precise breaches of the undertaking of which the plaintiffs complained.*

B [33] The same spirit was echoed in *Chiltern District Council v Keane* [1985] 2 All ER 118, where Sir Donaldson MR at p 119 made this observation:

However, where the liberty of the subject is involved, this court has time and again asserted that the procedural rules applicable must be strictly complied with.

C *THE SAFEGUARDS UNDER O 52 OF THE RHC*

[34] The procedural law on committal in our law is laid down in O 52 of the RHC which is based on the then O 52 of the English Rules of Supreme Court 1965 (Revision 1965). It provides that no application for a committal order can be made D without leave of the court. The application for such leave must be made in accordance with 0 52r2 of the RHC.

[35] For ease of reference, r 2 is reproduced below:

2 (1) No application to a Court for an order of committal against any person may be E made unless leave to make such an application has been granted in accordance with this rule.

(2) An application for such leave must be made ex parte to the Court, except in vacation when it may be made to a Judge in Chambers, and must be supported by a statement setting out the name and description of the applicant, the name, F description and address of the person sought to be committed *and the grounds on which his committal is sought*, and by an affidavit, to be filed before the application is made, verifying the facts relied on.

[36] The safeguards in r 2(2) entail the application to be supported by a statement G describing amongst others, the person sought to be committed and the grounds on which he is alleged to be in contempt. It must be supported by an affidavit verifying the facts relied on in the statement.

[37] We wish to state in clear term that *the alleged act of contempt must be adequately described and particularised in detail in the statement itself.* The accompanying H affidavit is only to verify the facts relied in that statement. It cannot add facts to it. *Any deficiency in the statement cannot be supplemented or cured by any further affidavit at a later time. The alleged contemnor must at once be given full knowledge of what charge he is facing so as to enable him to meet the charge. This must be done within the four walls of the statement itself.*

I (Emphasis added.)

[8] Hence, it is clear that for committal, the charge of contempt must be based on the grounds as set out in the statement filed pursuant to O 52 of the

Rules of Court 2012 and it would be impermissible for the party applying for committal to rely on matters stated in affidavits or submissions.

ISSUE NO 1

Whether a monetary judgment can be enforced by contempt proceedings

[9] As is self-evident from the order, there are 13 terms which are set out therein. The terms relate to monetary and non-monetary obligations. The committal proceedings have been taken only in relation to the monetary provisions in paras (c), (d) and (e) of the order, which are summarised as follows:

(a) maintenance of RM2,000 per child every month for the two children of the marriage (para (c) of the order);

(b) maintenance of RM6,000 every month for the plaintiff (para (d) of the order);

(c) a sum of RM10,000 at the beginning of the year as holiday expenses, Chinese New Year expenses and preparations for school for the children (para (e) of the order).
(See: exh 'E' in the afidavit Menentusahkan Penyataan affirmed by PW on 6 February 2013)

[10] Counsel for RH contends that the committal proceedings herein are misconceived and bad in law as the Rules of Court 2012 do not provide for committal proceedings to be taken out for breach of payment of money and that PW ought to have proceeded with execution of the subject terms in the order under the provisions for execution of monetary judgments.

[11] In this regard, counsel for RH referred to *Hong Leong Bank Bhd v Phung Tze Thiam John Phung* [2008] 2 MLJ 785; [2008] 4 CLJ 742 (*'Hong Leong Bank's'* case) where Gopal Sri Ram JCA, addressed this issue as follows:

> [4] The second point we make has to do with the choice of the enforcement remedy. Can the appellant enforce the order of this court directing the refund by way of committal proceedings? In answering this question, we must bear in mind that it is only an order that requires a party to do or refrain from doing an act that may be enforced by committal for contempt. That much is clear from the terms of the RHC O 45 r 5 which provides as follows:
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> (1) Where:
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> (a) a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time or, as the case may be, within that time as extended or abridged under Order 3, rule 5; or

(b) a person disobeys a judgment or order requiring him to abstain from doing an act, then, subject to the provisions of these rules, the judgment or order may be enforced by one or more of the following means, that is to say —

(i) with the leave of the Court, an order of committal;

(ii) where that person is a body corporate, with the leave of the Court, an order of committal against any director or other officer of the body;

(iii) subject to the provisions of the Debtors Act, 1957, an order of committal against that person or, where that person is a body corporate, against any such officer.

Now, in *Re Oddy, Major v Harness* [1906] 1 Ch 93 it was held by the English Court of Appeal that *'an order to recover money is not an order on the defendants to do anything, and therefore that such order could not be enforced either by a supplementary order for the payment of the money within a fixed time* or by attachment', per Luxmoore J in *Iberian Trust, Ltd v Founders Trust and Investment Co, Ltd* [1932] 2 KB 87. The order of 25 April 2007 in essence required the respondent to re-pay a part of the sum that had been paid to him by the appellant. In point of form, it may appear to be an order requiring the respondent to do an act, namely to refund the money. *But a court Is concerned with substance and not form. And the substance of the order under consideration here is that it is a money judgment and not a judgment requiring the performance of an act.* We must therefore answer the question we posed in para 4 of this judgment in the negative. That is to say, the order of this court dated 25 April 2007 cannot be enforced by means of committal proceedings. But that is not to say that the appellant bank is not without remedy. It may enforce the said order in the usual way in which money judgments are enforced.

(Emphasis added.)

[12] Relying upon the principle enunciated by the Court of Appeal in the *Hong Leong Bank's* case, it was submitted for RH that paras (c), (d) and (e) in the order are terms of a money judgment and *not* orders requiring RH to do any act. According to counsel for RH, PW's application dated 6 February 2013 (encl 38) for leave to take out committal proceedings against RH and the instant notice of application (encl 46) are misconceived at best and an abuse of process at worst and that encl 46 ought to be dismissed on this ground alone.

[13] On the other hand, counsel for PW relied on the judgment of the Court of Appeal in *Hong Kwi Seong v Ganad Media Sdn Bhd* [2013] 2 MLJ 251 ('Ganad Media's case') where Justice Low Hop Bing JCA, had distinguished the *Hong Leong Bank's* case and took a different approach and ruled that contempt proceedings could be taken for disobedience of payment obligations under monetary judgments.

[14] In *Ganad Media's*'s the facts were that after obtaining a money judgment against the appellant ('judgment debt'), the respondent obtained an order to examine the appellant ('examination order') and when the appellant did not

appear for examination, the respondent obtained an order for payment of the judgment debt in instalments ('payment order'). The appellant did not appeal against the payment order nor did it make payment on the due dates. The respondent then obtained leave to issue committal proceedings in the High Court which was followed by the committal orders for contempt of court ('committal orders'). The appellant argued that the ground on which the respondent had obtained the committal orders was the appellant's failure to pay the instalments under the payment order.

[15] Therefore, it was contended for the appellant in the *Ganad Media's* case that the non-payment of a money judgment cannot be punished with contempt of court and relied on the case of *Hong Leong's* case. Thus the issue that arose for the court's determination was whether the learned judge of the High Court was correct in dismissing the appellant's application to set aside the committal orders and the warrants of committal. The Court of Appeal dismissed the appeal. In that case, Justice Low Hop Bing said,

> … With the utmost respect, we are unable to agree with the decision of the Court of Appeal in Hong Leong Bank's, that a money judgment directing Phung to repay the money could not be enforced by committal proceedings. While it is true that a money judgment could be enforced pursuant to the Debtors' Act 1957, the Act does not, either expressly or by necessary implication, exclude committal proceedings in the event of a defendant's refusal or neglect to do the act within the time specified in the money judgment Hence, we respectfully hold that the decision of the Court of Appeal in Hong Leong Bank's, does not assist the appellant in the instant appeal.
>
> The specific terms of the judgment or order are of overriding importance, as they are to be construed by the court in order to determine the legal effect as to whether the defendant is required to do an act within a time specified therein and whether the defendant has refused or neglected to do so within the prescribed time in the context of O 45 r 1(a). The court will then decide whether or not to grant leave to the plaintiff to pursue an order of committal under O 45 r 1(a)(1).

[16] Counsel for RH sought to distinguish the *Ganad Media's* case by submitting that in that case the order for payment for instalments was made pursuant to the provisions of the Debtor's Act 1957 unlike the instant case where the order for payments were made after trial. But from my reading of the *Ganad Media's* case it seems quite clear that that enforcement by way of committal was not confined only to persons who have been examined as to their means to pay pursuant to the provisions of the Debtors Act 1957. This is to be gathered from the following passage in the judgment of the Court of Appeal at p 258 where it was stated, 'On the other hand, in Hong Leong Bank's, the terms of the order did direct Phung to refund the sum paid to him, less the sum of RM130,000 paid to EPF, and so are vastly different from the terms of the orders prevailing in the aforesaid two English authorities. With the utmost respect, we are unable to agree with me decision of the Court of Appeal

in Hong Leong Bank's, that a money judgment directing Phung to repay the money could not be enforced by committal proceedings. While it is true that a money judgment could be enforced pursuant to the Debtors' Act 1957, the Act does not, either expressly or by necessary implication, exclude committal proceedings in the event of a defendant's refusal or neglect to do the act within the time specified in the money judgment Hence, we respectfully hold that the decision of the Court of Appeal in Hong Leong Bank's, does not assist the appellant in the instant appeal.'

[17] In any event as a second layer of argument, counsel for PW said that there is a penal endorsement on the order and so any disobedience of any of the terms therein would constitute an act of contempt. However, as rightly pointed out by counsel for RH, the order has 13 terms, of which payment obligations are only a part of the order. There are several non-monetary aspects of the order, the disobedience of which would amount to contempt of court. I did not think that there was any merit in the point that was raised by counsel. In my view, the mere presence of the penal endorsement is not sufficient to overcome the prohibition to contempt and committal as enunciated in the *Hong Leong Bank's'* case. Thus, the mere presence of the penal endorsement does not of itself mean that all the terms of the order are such that they fall within O 45 r 1(a)(i) so as to enable an applicant to commence committal proceedings for disobedience of the order. The terms as contained in the order have to be examined for substance and must ultimately be one which is recognised by law as constituting an act, the disobedience of which would attract the penalties or punishment which would flow from its breach or disobedience.

[18] The next point or the third layer of argument by counsel for PW was that there was a previous application for committal arising out of RH's failure to pay the instalments and was found guilty and fined by the court. Apparently, RH meekly paid up the instalments and the fine and escaped the consequences of his (allegedly) contemptuous acts. But it was equally apparent (or at least confirmed by all counsel who appeared before me) that the jurisprudential dichotomy or divergence of views as presented by the *Hong Leong Bank's* case and *Ganad Media's* case were not taken up and ventilated when the first committal proceedings were argued before the previous judge. As such, the fact that previously PW was successful in taking out committal proceedings against RH based on his failure to meet the financial payment obligations under the order is of no utility and does not advance PW's case for committal against RH. As such, the fact that PW was successful in her first round of committal proceedings against RH is not and indeed cannot be an answer to the prohibition as enunciated by the court in the *Hong Leong's* case. In any event, the submissions that were taken up in the previous committal proceedings and the grounds of judgment (if any) where not shown to me. Hence, PW's success

in taking out committal proceedings against RH on a previous occasion hardly matters when considering the issues that are being deliberated in the present proceedings.

[19] Thus, I was left in the invidious position of having to choose between the two conflicting Court of Appeal decisions which are both binding upon this court. Ultimately, the view that I took is that the *Hong Leong Bank's* case is to be preferred which means that disobedience by a judgment debtor in respect of his obligations under a monetary judgment is not within the purview of the law of contempt. In making a choice as to which of the two decisions to follow, I was mindful of the need for observance of the doctrine of stare decisis. In this regard, I sought refuge in the guidance given by the Federal Court in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 (FC) where it was said as follows:

> The doctrine of stare decisis or the rule of judicial precedent dictates that a court other than the highest court is obliged generally to follow the decisions of the courts at a higher or the same level in the court structure subject to certain exceptions affecting especially the Court of Appeal.
>
> The said exceptions are as decided in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718. The part of the decision in *Young v Bristol Aeroplane* in regard to the said exceptions to the rule of judicial precedent ought to be accepted by us as part of the common law applicable by virtue of Civil Law Act 1956 vide its Section 3.
>
> To recap, the relevant ratio decidenci in Young v Bristol Aeroplane is that there are three exceptions to the general rule that the Court of Appeal is bound by its own decisions or by decision of courts of co-ordinate jurisdiction such as the Court of Exchequer Chamber. The three exceptions are first, a decision of Court of Appeal given perincuriam need not be followed; *secondly, when faced with a conflict of past decisions of Court of Appeal, or a court of co-ordinate jurisdiction, it may choose which to follow irrespective of whether either of the conflicting decisions is an earlier case or a later one;* thirdly it ought not to follow its own previous decision when it is expressly or by necessary implication, overruled by the House of Lords, or it cannot stand with a decision of the House of Lords. There are of course further possible exceptions in addition to the three exceptions in Young v Bristol Aeroplane when there may be cases the circumstances of which cry out for such new exceptions so long as they are not inconsistent with the three exceptions in Young v Bristol Aeroplane. (Emphasis added.)

I will now give reasons for preferring the *Hong Leong Bank's* case. They are as follows.

[20] First, if monetary judgments, whether they are to be paid in a lump sum or at different intervals by way of instalments payment, are to be enforced by way of committal proceedings then the effect would be that all judgments for the payment of money (regardless of whether they are made in matrimonial or other proceedings) may, without any exception, be enforced by committal

proceedings. That would mean that every judgment debtor who fails to make payment under an order of court would be liable to committal proceedings quite apart from the prospect of being adjudicated a bankrupt or having to face execution proceedings by way of a writ of seizure and sale, garnishee or charging order. If that is the intent of the Rules of Court 2012 then it must be clearly and unequivocally stipulated as such.

[21] This brings me to O 45 of the Rules of Court 2012 which governs the process of execution for monetary judgments. Whilst the focus of both the *Hong Leong Bank's* case and the *Ganad Media's* case was O 45 r 5, it is my view that whilst the conclusion and reasoning in the *Hong Leong Bank's* case is correct, there is yet another aspect that needs to be considered. It has to do O 45 r 1 of the Rules of Court 2012 which makes it patently clear as to the mode of enforcement of a monetary judgment. This is what it says:

> (1) Subject to the provisions of these Rules, a judgment or order for the payment of money, not being a judgment or order for the payment into Court, may be enforced by one or more of following means:
>
> (a) a writ of seizure and sale;
>
> (b) garnishee proceedings;
>
> (c) in a case in which rule 5 applies, an order of committal.
>
> (1A) In addition to rule 1(1) and subject to the provisions of these Rules, a judgment or order for the payment of money, not being a judgment or order for the payment of money into Court, may be enforced in the High Court by one or more of the following means:
>
> (a) a charging order; and
>
> (b) the appointment of a receiver.
>
> (2) Subject to the provisions of these Rules, a judgment or order for the payment of money into Court may be enforced in a case which rule 5 applies, by an order of committal. (2A) In addition to rule 1 (2) and subject to the provisions of these Rules, Oa judgment or order for the payment of money into Court may be enforced in the High Court by the appointment of receiver.
>
> (3) Paragraph (1) and (2) are without prejudice to any other remedy available to enforce such a judgment or order as is therein mentioned or to the power of a Court under the Debtors Act 1957 (Act 256) to commit to prison a person who makes default in paying money adjudged or ordered to be paid by him, or to the written law relating to bankruptcy of the winding up of companies.
>
> (4) In this Order, references to any writ shall be construed as including references to any further writ in aid of the first-mentioned writ.

[22] Hence, in my view, O 45 r 1 has stipulated very clearly how monetary

judgments are to be enforced. It is equally clear that committal is not a mode of enforcement for a monetary judgment, unless it is a monetary judgment which falls within O 45 r 5. Order 45 r 5 reads as:

> … where a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that that time or, as the case may be, within that time as extended or abridged under O 3 r 5: …
>
> (Emphasis added.)

[23] So, a mere obligation to pay under a judgment per se is not an obligation which falls within O 45 r 5. Hence, committal proceedings in respect of a monetary judgment is only reserved for an order where O 45 r 5 applies, meaning that the payment obligation must be such that it amounts to the doing of an act. The mere obligation to pay does not (and following the *Hong Leong's* case) cannot amount to the doing of an act. Obviously, it requires something more than that.

[24] So, for instance, if there is an additional obligation that has to be done which is coupled with a payment obligation, then perhaps it may be construed as the doing of an act, which, if disobeyed, could expose the disobedient party to committal proceedings. Indeed, paras (h) and (i) are ready examples of an obligation pursuant to the order, which that fit neatly within O 45 r 5, ie where RH is obliged to dispose of the matrimonial home and divide the proceeds and pay the PW her share of the proceeds. Therefore, assuming RH does sell the matrimonial home and decides to keep the proceeds all to himself, then his failure to pay PW her share of the proceeds will, in my view, fall within O 45 r 5 in the sense that RH was supposed to do an act within a particular time frame but failed or refused to do so. There is therefore an important and imperative distinction between payment obligations which fall within O 45 r 1 and those falling under r 5. If this distinction is not observed then it becomes a distinction without a difference.

[25] Before I leave this point, I should also add, for the sake of completeness, that s 86 of the Law Reform (Marriage and Divorce) Act 1976 which deals with recovery of arrears of maintenances, stipulates that it is recoverable as a debt and provable in bankruptcy. This statutory provision, which is specific to matrimonial proceedings, is very much in line with the principle enunciated by the Court of Appeal in the *Hong Leong's case*, ie that monetary judgments are to be recovered by way of execution and not by committal proceedings. Also, it should be noted that O 45 r 1 (3) provides that, 'Paras (1) and (2) are without prejudice to any other remedy available to enforce such a judgment or order as is therein mentioned or to the power of a court under the Debtors Act 1957 (Act 256) to commit to prison a person who makes default in paying money adjudged or ordered to be paid by him, or to the written law relating to

bankruptcy of the winding up of companies.' This to my mind suggests that the Debtors Act 1957 is a route that may be pursued for committal for mere payment of money under a judgment. If committal under O 45 r 5 is pursued, then it has to be an obligation which is not just a mere payment of money.

[26] As such, I would conclude that for the reasons as articulated above, the interpretation rendered by the Court of Appeal in the *Hong Leong's Bank's* case, which excludes from the purview of O 45 r 5 any enforcement by committal proceedings of any payment obligations under any monetary judgment, is to be preferred.

[27] Of course, I have entertained the possibility that I could be wrong and it is entirely possible that the principle enunciated in the *Ganad Media's* case correctly reflects the jurisprudence on enforceability of monetary judgments through committal proceedings. Whether the *Hong Leong's* case or *Ganad Media's* case is to prevail would obviously have to be settled decisively at a later date and in another forum. On this point I should add that the Ganad Media's case did proceed further to Federal Court (see *Hong Kwi Seong v Ganad Media Sdn Bhd and another appeal* [2013] 6 MLJ 765). Leave was granted in respect of certain questions of law. However, the appeal was dismissed for procedural reasons and the questions in respect of which leave was granted were not answered. As such, the correctness of the pronouncements made by the Court of Appeal in the *Ganad Media's* case and by extension the *Hong Leong Bank's* case are yet to be tested in the Federal Court. For now and assuming I am wrong and if the failure to meet the payment obligations under the order is capable of enforcement by way of committal proceedings, then the next issue that needs to be considered is whether RH has wilfully disobeyed the order. This is a factual issue and is discussed below as Issue No 2.

ISSUE NO 2

Whether RH was in wilful breached of the order

[28] PW's counsel Mr Sunny Khoo and John Khoo maintain that RH has in fact disobeyed the order and is in contempt of court. Of course, Mr John Khoo had made the point that whilst his client was compelled to commence committal proceedings, he was optimistic that it would not come to this and had hoped that 'common sense would prevail'. That was probably wishful thinking on his part as RH was unrelenting and maintained that he was a bankrupt and did not have the means to meet his financial obligations as per the order. RH's status as a bankrupt is not in dispute. However, PW has grave doubts as to whether the debt which gave rise to the judgment in default that was taken against RH was a genuine one. The suggestion that was made by counsel for PW is that this was not a genuine debt and is highly suspicious or

rather that RH had conveniently allowed judgment to be entered and be adjudicated as a bankrupt so as to avoid his payment obligations under the order. I will advert to these issues later on this judgment.

[29] As RH was a bankrupt, Puan Zainab bt Maydin Pillai on behalf of the Ketua Pengarah Insolvensi ('KPI') appeared before the court and confirmed that according to the KPI's records, RH had reported to KPI that his income was only RM1,500 per month. She also said that proof of debt had not been filed by any creditor. In particular the judgment creditor, Koo Hian Hui (suing as a sole proprietor on behalf of the firm of Time System Engineering No Pendaftaran PG 0149395 – A) ('the judgment creditor') who had filed the creditor's petition and obtained adjudicating and receiving orders against RH on 7 February 2013 had not filed proof of debt. It is also not in dispute that the judgment creditor had previously filed a debt recovery suit (allegedly for goods sold and delivered) against RH and obtained judgment in default on 9 July 2012 in the sum of RM85,713.60 in the Sessions Court at Butterworth Summons No 52–961–06 of 2012 ('the JID'). Bankruptcy proceedings had been taken out pursuant to the JID. It is also not in dispute that RH did not contest the suit nor did he apply to set aside the JID.

[30] In an attempt at repudiating the genuineness of the debt recovery suit and bankruptcy proceedings against RH, PH filed an affidavit (encl 49) and asserted that, 'saya menegaskan bahawa responden memiliki hartanah dan asset yang melebihi jumlah RM85,713.60 tersebut. Saya percayai bahawa *perbuatan sedemikian oleh responden adalah semata-mata untuk menghampakan hak saya untuk menerima bayaran-bayaran nafkah daripada responden* …'. I should add that encl 49 was filed in respect of another application and not specifically for the purposes of the committal proceedings. But most critically, none of the averments in encl 49 pertaining to the RH's (alleged) nefarious attempt at avoiding his payment obligations under the order were alluded to in the O 52 statement. They arose collaterally in an affidavit filed for another purpose, which with my leave was allowed to be read for the purposes of the committal proceedings. However, following the principle of law that is to be distilled from the decision of the Federal Court in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors* [2012] 3 MLJ 458 the deficiencies in the O 52 statement cannot be made good by further affidavits. As such, encl 49, even if read for the purposes of the committal proceedings, is of precious little use in terms of making out the charge of contempt against RH vis-a-vis the O 52 statement.

[31] For what it is worth and for the sake of completeness, I shall in any event touch upon the matters alluded to encl 49. Basically what PW was asserting in encl 49 above was that the JID is a sham and that RH had colluded with a third party to have the JID entered against him and that he was prepared to have

himself declared as a bankrupt so as to avoid his financial obligations towards PW as per the order. It was suggested in submissions by counsel for PW that it is uncharacteristic of RH not to defend the judgment creditor's suit nor to set aside the JID. As such, I was asked to draw an inference that this whole episode was a sham to enable RH to avoid his financial obligation to PW.

[32] It was also submitted by counsel for PW that RH's explanation that he was only earning RM1,500 was exactly the same as his testimony before the trial judge during divorce proceedings and that the trial judge had disbelieved RH and proceeded to make various monetary orders against RH which was far above his purported earnings at that material time. According to counsel for PW, nothing has changed except that now RH was facing committal proceedings and that I should likewise disbelieve RH's evidence that he is of limited financial means.

[33] On the other hand, it was submitted by counsel for RH that in the event the court does not accept the *Hong Leong Bank's* principle, then RH is in any event, not in willful breach of the order. Counsel for RH referred to the case of *Messrs Hisham, Sobri & Kadir v Kedah Utara Development Sdn Bhd & Anor* [1988] 2 MLJ 239, where Edgar Joseph Jr J had held that an order for committal can only be made if the act of contempt is wilful. He said:

> There is authority for the view that an order for committal or the issue of a writ of sequestration is only appropriate where the contempt is wilful. (See *Fairclough & Sons v Manchester Ship Canal Co*) Indeed, the former Rules of the Supreme Court in England imposed such a requirement specifically. However, the present Order 45 rule 5 in England, which is in pari materia with the identically numbered rule in our Rules of the High Court, omits the word 'wilful'. Nevertheless, the word 'wilful' must be taken to be silently implied and so the position remains unchanged despite the omission (see *Heaton's Transport v TGWU Ship Canal Co*).

[34] In that case, Edgar Joseph Jr J went on to hold in as follows:

> After careful consideration, I accept the uncontradicted explanation given by the alleged contemnors for failing to comply with the consent order as I find nothing improbable in it. There is thus raised, in their favour, more than a reasonable doubt, the benefit to which they are entitled: Re Bramblevale Ltd. Accordingly, so far as may be necessary, I find as a fact that the contemnors have not committed any wilful contempt of court.

[35] Also, counsel for RH had referred to the decision of the Federal Court in *Tay Seng Keng v Tay Ek Seng Co Sdn Bhd* [1978] 1 MLJ 126, which had allowed an appeal against the order of committal notwithstanding that the High Court judge had found the contemner's version to be a mere denial. In setting aside the High Court order, the Federal Court held as follows:

Having heard arguments from both sides the view which we took was that the learned judge had decided the whole case solely on the affidavits. It is clear that there were affidavits on both sides, so that on a mere consideration of such affidavits, it was quite impossible to say that the guilt of the appellant had been proved with such strictness of proof as is consistent with the test of 'beyond reasonable doubt'.

[36] As such, it was submitted that PW is required to prove that the RH's purported contemptuous conduct is wilful or contumelious beyond reasonable doubt. In this regard, counsel referred to RH's affidavit affirmed on 1 October 2013 averred as follows:

(7) I refer to paras 6, 7 and 8 of the Affidavit Menentusahkan Pernyataan and deny that I have refused to pay the maintenance due to the Petitioner and the two children of the marriage. I did not pay because I am not able to pay the full sum of the plaintiff and the children's maintenance. I have failed in my business and was made a bankrupt by a Court order dated 07-02-2013 under Bankruptcy case No: 29-3328-11/2012. A copy of a letter dated 14-02-2013 from Jabatan Insolvensi Malaysia is attached herewith and marked as Exhibit-B.

(8) I had however, obtained the assistance of my father to pay a total of RM47,000 to the Petitioner from February 2012 to December 2012 as reflected in particulars of payment in paragraph 8 of the Affidavit Menentusahkan Pernyataan.

(9) I am advised by my solicitors and verily believe that according to s 24 (4) and s 38 (d) of the Bankruptcy Act 1967, all my assets and property (which I have none) are now vested in the Director General of Insolvency and I can no longer deal with my assets and income except with the permission of the Director General of Insolvency or from the Court.

(10) I refer to paras 9 and 10 of the Afidavit Menentusahkan Pernyataan and aver that at all material times, I did not have the funds to pay the said outstanding sum of RM93,000.

(11) I deny para 11 of the Afidavit Menentusahkan Pernyataan. I aver that at all times, I have no intention of being disrespectful or contemptuous of this Honourable Court. I simply did not have the funds to comply with the said Order of 23 December 2011. I have shown this by asking my father to help me by paying the Petitioner some monies as maintenance although not the full amount.

[37] RH's averments as above stated were not contradicted by PW by way of an answering affidavit. In the result it was submitted that in the light of RH's uncontradicted averments and the principles of law set out herein, the onus is on PW to prove that the RH does have the funds for her to establish that the RH is wilfully in breach of the terms of the order to pay the sums as ordered.

[38] The Federal Court in *Tay Seng Keng v Tay Ek Seng Co Sdn Bhd* [1978] 1 MLJ 126, analysed the evidence in the following manner:

> It was common ground that the order which was alleged to have been disobeyed by the appellant related to the account books etc. for the period July 1972 to June 1974. The numerous affidavits filed on behalf of the respondents tended to show that these books of account should have been in the possession of the appellant, although there were no positive statements by any of the deponents of those affidavits that the account books in question had been seen with the defendant at about the time that his services as manager were terminated. There was also no evidence in any of the affidavits that the appellant had been seen to remove any of the books of account. The appellant himself had categorically stated in his affidavits that those account books were not in his possession.

[39] In the instant case, the *Penyataan Menurut Aturan 52 Kaedah 3(3), Kaedah- kaedah Mahkamah 2012 (encl 40)* and the *Afidavit Menentusahkan Penyataan* of Lee Lay Ling affirmed on 6 February 2013 (encl 39), do not contain a single averment that RH is wilfully refusing to pay although he has adequate funds to comply with the monetary provisions of the order of 23 December 2011, let alone any evidence that he is in possession of such funds.

[40] Accordingly, it was submitted that PW cannot cure the defects by way of affidavit or oral evidence. Low Hop Bing J (as he then was) made this point very clear in *Interfood Sdn Bhd v Arthur Andersen & Co & Anor* [2000] 5 MLJ 26:

> The oral evidence cannot add to any grounds to the committal proceedings because these grounds must first be contained in the statement under O 52 r 2(2) of the Rules of the High Court 1980 ('RHC'). Further, O 52r 5(3) provides that no grounds shall be relied upon except the grounds set out in the statement under O 52 r 2 (2), unless the court hearing an application for an order of committal grants leave. That is a separate proceeding.

[41] Also, in order to show absence of mala fides on the part of RH, it was pointed out by counsel for RH that although the RH does not have adequate funds, he has enlisted the assistance of his father to pay PW a total sum of RM47,000 in the period from January 2012 to December 2012. It was submitted that as RH has been adjudged bankrupt since 7 February 2013, he is unable to make any payment at all as his assets and income are now vested in the official assignee. In this regard, RH is unable to purge his contempt even if he has the funds, which he does not.

[42] In *Messrs Hisham, Sobri & Kadir v Kedah Utara Development Sdn Bhd & Anor* [1988] 2 MLJ 239 Edgar Joseph Jr J had to deal with a contemnor who was bankrupt. His Lordship set out the law on the said issue:

> Now, it is well-settled law that contempt of court is an offence of a criminal character since the liberty of the alleged contemnor is at stake. That being so, it is fundamental that a man ought not to be penalised unless he has both a fair opportunity to comply with the law and the capacity to do so. Any other approach would not only be morally objectionable but also should have no place in a legal system based on ideas of fair play and justice.

[43] In that case, His Lordship went on to hold that the committal proceedings against the bankrupt contemnor was unsustainable. Accordingly it was submitted for RH that in the circumstances, the PW has failed to make a case of wilful contempt on the part of RH. It was also submitted that PW has also failed to show that RH has the capacity to comply with the monetary terms of the order of 23 December 2011.

[44] In conclusion it was submitted that in the circumstances, the Penyataan Menurut Aturan 52 k 3(3), *Kaedah-kaedah Mahkamah 2012* (encl 40) and the *Afidavit Menentusahkan Penyataan* of Lee Lay Ling affirmed on 6 February 2013 (encl 39) are inadequate to discharge PW's burden to prove beyond reasonable doubt, that RH's conduct is in contempt of court.

[45] In my view, it would be wrong as a matter of principle to draw adverse or negative inferences against RH especially in committal proceedings which are quasi criminal in nature where the charge of contempt has to be proven beyond reasonable doubt. It is worth recapitulating that even in civil proceedings, judges are generally loath to making findings of mala fides based on affidavit evidence alone. There is also a general disinclination to make inferences of mala fides based on affidavit evidence alone. See *Re Smith & Fawcett Ltd* [1942] 1 All ER 542, Lord Greene MR, who said, 'Speaking for myself, *I strongly dislike being asked on affidavit evidence alone to draw inferences as to the bona fides or mala fides of the actors.* In the present case the principal director has sworn an affidavit which, if accepted, makes it clear that, whether rightly or wrongly, the directors have bona fide considered the interests of the company and come to the conclusion that it would be undesirable to register the transfer of the totality of these shares. We are invited to say that that does not represent the fact and that the real motive which influenced the deponent was not a consideration for the interests of the company but a consideration for his own personal interests. *I for one, except in a clear case, am strongly opposed to drawing an inference of that kind from mere affidavit evidence.* If it is desired to charge a deponent with having given an account of his motives and his reasons which is not the true account, then the person on whom the burden of proof lies should, in my judgment, take the ordinary and obvious course of requiring the deponent to submit himself to cross-examination. That does not, of course, mean that it is illegitimate to draw such inferences in a proper case. *There maybe on the face of the affidavit sufficient justification for doing so, but where you have*

the oath of the deponent, as we have it here, and the only grounds on which the court is asked to disbelieve it are matters of inference, many of them of a doubtful character, I for one must decline to give to those suggestions the weight which it is desired to give to them. (Emphasis added.)

[46] Here, we are dealing with committal proceedings which are quasi criminal in nature. Hence, it becomes all the more necessary and imperative that the matter be determined on the basis of the undisputed facts or facts which have not been credibly denied. Critically, there was no attempt to cross examine RH on his averments in his affidavits with regards to his impecuniosity and bankruptcy. Accordingly, I declined the invitation by counsel for PW to make adverse findings based on inferences of willful intent on the part of RH to disobey the order.

[47] The conclusion that I reached at the end of the day was that evidence of willful default is lacking. Of course I am left with nagging suspicion about the genuineness of the suit by the judgment creditor and the JID and the bankruptcy proceedings that followed. But I simply do not have the requisite material before me to form a conclusive view that RH has colluded with the judgment creditor and effectively practiced deception on the court by being a party to a sham JID and bankruptcy so as to avoid his financial obligations under the order.

[48] There are of course tell-tale signs that RH's declared lack of means may well be contrived. But that has to be pleaded and particularised in the O 52 statement and proven in the usual way. The paucity of evidence in this regard cannot be supplanted by any inference by the court no matter how strong the temptation to do so.

[49] From a procedural standpoint, it must be emphasised rather significantly that PW did not predicate her application for committal on the lack of genuineness of the suit or the bankruptcy that followed. All that was stated in the O 52 statement (which is a necessary pre-requisite for the grant of leave) is that RH had failed to meet his payment obligations under the order. Nothing was said about the suit and the JID being a sham. Hence, in fashioning her case for committal based on submissions alone or by putting in further affidavits or referring to affidavits filed in respect of another application, when those matters are not referred to in the O 52 statement would be procedurally and substantively defective as the charge of contempt must be culled from the four corners of the O 52 statement.

[50] Hence, the charge of contempt as per the O 52 statement was tersely stated to be RH's failure to pay the amounts that were due under the order, which RH does not deny but says that he is impecunious and a bankrupt and

therefore unable to pay. On the materials that were placed before me, all that I can conclude is that RH only earns RM1,500 per month and due to his bankruptcy status, he is in no position to meet his financial obligations under the order. This was echoed by the KPI. Apart from the absence of any statement or particulars of willful default in the O 52 statement, there was also no evidence to the contrary that was presented to the court, such as would credibly repudiate RH's plea of impecuniosity.

[51] In the result and for the reasons as articulated above, I was ultimately impelled to the conclusion that PW had not discharged her burden of proving beyond reasonable doubt that RH was in willful default of his payment obligations under the order. As such, I dismissed encl 46 with costs of RM5,000 to be paid by PW to KPI and which is to be set off against the monies that are due from RH to PW upon proof of debt being filed by PW.

Order accordingly.

Reported by Afiq Mohamad Noor